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In the

# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 85

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THE TRAILMOBILE COMPANY
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, UAW-CIO, LOCAL No. 392,
Petitioners,
vs.
LAWRENCE WHIRLS,
Respondent

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## REPLY BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA UAW-CIO, LOCAL 392

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The heart of Respondent's argument is that Section 8 (b)(B) of the Selective Service and Training Act of 1940, which provides that an employer shall "restore" a veteran to "such position or to a position of like seniority, status, and pay * * *" implies restoration to "a continuing relationship between employer and employee."[1] From

[1] Respondent's brief, page 26.

this premise, Respondent argues that "since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ."[2]

To arrive at this interpretation of the statute, the Respondent seeks to define the word "restore" to mean something more than the original act of placing the veteran in the same position that he would have had if he had not been inducted. The Respondent would have this court define the word "restore" to encompass the full term of the relationship between the employer and the veteran, from the date on which he was re-employed to the date of his final separation.

That Congress intended by the phrase "restore to such position" to mean only the original re-employment of the veteran, is made abundantly clear by Section 8 (b)(c). In this Section, Congress provided that the veteran "shall not be discharged from *such position* without cause within one year after *such restoration.*" Congress certainly intended that the words "such position" and "such restoration" as used in this subsection, should have the same meaning as the words "restore" and "such position" as used in Section 8 (b)(B). Therefore, if Respondent's definition of these words is correct, it should make sense when applied to either section of the Act.

When we apply Respondent's definition to Section 8 (b)(c), we obtain a meaning other than has been attributed to it by the courts or even by Selective Service, and contrary to the plain intent of its language. Section 8 (b)(c) has been universally construed to mean that Congress prohibited the discharge of a veteran without cause for

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[2] Respondent's brief, page 29.

one year after the date of *his re-employment*. Even the Respondent conceded this meaning for Section 8 (b)(c).[3] Thus, the prohibition against discharge for one year from the date of the veteran's "restoration" to "such position" means one year from the date on which the veteran was re-employed.

But Respondent now contends that "restoration to a position in the employ of the employer necessarily implies a continuing relationship between employer and employee, and cannot be merely a single one-time obligation which is entirely fulfilled when the employer places the veteran's name on his rolls, or the first time the veteran comes to work."[4] Under this definition, the "one year" prohibition against discharge would run from some indefinite date included within the period of "continuing relationship" between the employer and the veteran. We do not believe that such a meaning can be read into Section 8 (b)(c). Consequently this meaning cannot be read into the same words when used in Section 8 (b)(B).

In the *Fishgold* case, this court did not have under direct consideration the precise question raised here, but there is an implicit assumption in the opinion that the "restoration" to "such position," required by the Act, referred to the original re-employment of the veteran rather than the "continuing relationship" contended for by the Respondent. The following language of the court in the *Fishgold* case supports this view:

> "We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as

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[3] This interpretation is taken for granted by Respondent throughout its brief. See pages 22, 43.

[4] Respondent's brief, page 26.

> was possible. No step-up or gain priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

If, as the Respondent contends, Section 8 (b)(B) protects against any change in his employment relationship for an indefinite period following his reinstatement, it is difficult to understand the reason for Congress adding the one year's protection against discharge in Section 8 (b)(c). According to Respondent, the veteran is fully protected against discharge or demotion without cause, not only for one year after his reinstatement, but for the duration of his employment. This interpretation would seem to make the protection against discharge for one year redundant. Yet in the *Fishgold* case, this court found that the prohibition against discharge for one year constituted an important element in the protection of the veteran's re-employment rights.

We do not believe that Congress intended to be redundant. We belive, rather, that Congress intended by Section 8 (b)(B) to give the veteran all his seniority rights upon re-employment, so that he would stand in the same position with respect to other employees as though he had not been inducted and, as a further protection, provided by Section 8 (b)(c) that he could not be discharged without cause for one year. Only by this construction can both sections be harmonized.

Under Respondent's construction of Section 8 (b) (B), the seniority position which the veteran held at the time of his *induction*, may not thereafter be changed adversely, at least without his consent. Yet it is often necessary to effect changes in seniority systems, due to such factors as:

The growth or decline of the bargaining strength of the workers, the change in the nature of the plant operations, the failure of the existing system to function fairly, the elimination of operations or of a department within a plant, the change in the composition of the labor force within the plant, the transfer of operations to another building, etc.

The decision of the lower court would compel employers to maintain, for every veteran, the seniority status which he held on the date of his induction, despite all subsequent changes which may occur in the particular plant or industry. This clearly appears from the lower court's opinion:

> "As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces."

Since the employer and the union may not "bargain away" the seniority rights of a returned veteran, it is clear that any subsequent change in the seniority rules affecting all employees alike, desirable as they might be, would be in violation of the law if they adversely affected the status which the veteran held at the time of his induction.

In an effort to avoid this logical but impractical implication of its strained construction of the Act, the Respondent advances an argument which requires it to rewrite the language of the Act:

> "Protection against unfavorable changes in employment conditions is afforded indefinitely. This

> is not to say, however, that the veteran's job is absolutely frozen forever, in all its incidents. The statute assumes change, as new circumstances actually require, though not at the whim of the employer or of a hostile union. *Section 8 (b) (B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to maintain the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment.*"

The Respondent first adopts an illogical and unnatural definition of the phrase "restore to such position" in order to justify its position in this case. It then finds that the inescapable logic of its argument places it in the untenable position of permanently freezing the seniority status of all veterans within the framework of a fluid seniority system necessary to our constantly changing industrial economy. It is then forced to escape from the dilemma thus created by rewriting the law.

Section 8 (b)(B) requires an employer to "*restore*" a veteran to his position "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." The Respondent now reads this plain language to say "Section 8 (b)(B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to *maintain* the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment."

Thus, without explanation but nevertheless with the assurance that it is "clear," the word "restore" becomes "maintain," and Congress is committed to a policy of permitting seniority changes affecting veterans only where a court finds that it is reasonable.

We submit that no such policy is indicated in the history or language of the Act. And the implications of such a policy are far reaching, since for an indefinite period, it will prevent the natural development of the seniority system which in the end is the most effective protection for all workers including veterans.

Respectfully submitted,

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